SUPREME COURT, U. S.

FILED
SEP 12 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 26

CHARLES E. BUNTON, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

VERNON TOM GRIFFIN, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

SETH BALLARD, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

BRIEF FOR APPELLEES

JOE T. PATTERSON
Attorney General of the State of Mississippi
WILL S. WELLS
Assistant Attorney General of the State of Mississippi
J. T. DRAKE
Post Office Box 366
Port Gibson, Mississippi
CORBAN AND CORBAN
Attorneys at Law
Fayette, Mississippi
CALVIN L. KING
Post Office Drawer 392
Durant, Mississippi
Attorneys for Appellees

INDEX

Questions Presented 1

Statement of the Case 2

Argument—

I. Jurisdiction—Whether Three-Judge District Court Was Properly Convened 3

II. Section 6271-08 of the Mississippi Code As Amended by the Mississippi Legislature Does Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965 11

Conclusion 23

Table of Cases

Davis v. *Gallinghouse*, 246 F. Supp. 208 11

Dusch v. *Davis*, 18 L.Ed.2d 656 23

Jarecki v. *G. D. Searle & Co.*, 367 U.S. 303, 6 L.Ed.2d 859, 81 S.Ct. 1579 14

Local 1976, U. B. C. & J. v. *N.L.R.B.*, 357 U.S. 93, 2 L.Ed.2d 1186, 78 S.Ct. 1011 13

Phillips v. *United States*, 312 U.S. 246 7

Sailors v. *Kent Board of Education*, 18 L.Ed.2d 650 15

Sellers v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966) ..21, 22

South Carolina v. *Katzenbach*, 383 U.S. 301, 15L.Ed.2d 769, 86 S.Ct. 803 .....14, 21

Swift & Co. v. *Wickham*, 382 U.S. 111 3

United States v. *McKesson & Robbins, Inc.*, 251 U.S. 305, 100 L.Ed. 1209, 76 S.Ct. 937 16

United States v. *Oregon*, 366 U.S. 643, 6 L.Ed.2d 575, 81 S.Ct. 1278 16

United States v. *Ramsey*, C.A. Miss., 1965, 353 F.2d 650 11

United States v. *Ward*, C.A. La., 1965, 352 F.2d 359 11

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States—

Fourteenth Amendment 3

Fifteenth Amendment 3, 23

Section 6271-08, Mississippi Code, As Amended 2, 8, 12, 14, 15, 16, 21

Voting Rights Act of 1965—

Section 2 (42 U.S.C. 1973) 19, 20

Section 4 (42 U.S.C.A. 1973b(a)) 20, 21

(42 U.S.C.A. 1973b(c)) 21

Section 4(a) 4, 9

Section 5 (42 U.S.C. 1973c) 2, 3, 4, 5, 6, 7, 8, 9

(42 U.S.C.A. 1973c) 11, 13, 15, 16, 19, 20, 21, 22

Section 10 6

Section 10(c) 6

Section 14(b) 7

Section 14(c) 13

Section 12(d) 6

28 U.S.C. 2281 ..... 5, 6, 7, 8, 9, 11

42 U.S.C. 1971 ..... 8, 9

OTHER AUTHORITIES

Alabama Act No. 536 22

Black's Law Dictionary 15

Congressional Record, April 22, 1965, Senate, page 8297 18-19

Hearings Before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty-Ninth Congress, First Session on H.R. 6400, Serial No. 2 12

Hearings Before the Committee on the Judiciary, United States Senate. Eighty-Ninth Congress. First Session 9, 10, 16, 19

House Congressional Record. page 4924 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 26

CHARLES E. BUNTON, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

VERNON TOM GRIFFIN, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

SETH BALLARD, ET AL.,
Appellants,

vs.

JOE T. PATTERSON, ET AL.,
Appellees.

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Jurisdiction—Whether Three-Judge District Court was properly convened.

2. Whether the District Court erred:

(a) In finding that Section 6271-08 of the Mississippi Code, as amended by the 1966 session of the Mississippi Legislature, does not come within the purview of, and is not covered by, Section 5 of the Voting Rights Act of 1965 (42 U.S.C. Section 1973c) so as to require compliance with said Section 5 by the State of Mississippi and the counties involved in each of the cases herein on appeal, prior to enforcing or applying Section 6271-08 as amended; and

(b) In dismissing each of the complaints, thereby denying the relief requested therein.

3. Whether the November 7, 1967, election in each of the counties herein involved having been held in accordance with Section 6271-08, as amended (i.e., no election for County Superintendent having been held), this Court, if it finds that Section 5 of the Voting Rights Act of 1965 should have been complied with as aforesaid, should order an election of such County Superintendent of Education pursuant to the provisions of Section 6271-08 prior to its amendment in 1966.

STATEMENT OF THE CASE

These consolidated cases deal solely with the applicability of Section 5 of the Voting Rights Act of 1965 to Section 6271-08 of the Mississippi Code.

Appellants in their original Complaint asserted a second claim for relief claiming that the Amendment to Section 6271-08 of the Mississippi Code, and the actions taken pursuant thereto by the Appellees, had the purpose and effect of denying or abridging on account of race or color the right to vote of the individual Appellants and the class they purported to represent, and further charged said actions prevented the election of Negro candidates to the office of Superintendent of Education; and further charged

that the said actions prevented potential Negro candidates from holding the office of Superintendent of Education in said counties in violation of the Fourteenth and Fifteenth Amendments to the Constitution. This second claim was *dismissed upon the voluntary Petition for Dismissal by the Appellants.*

ARGUMENT

I.

Jurisdiction—Whether Three-Judge District Court Was Properly Convened

The threshold question before the Court, the consideration of which was postponed to the merits, is whether this Court, rather than the Court of Appeals, has jurisdiction to review the District Court's determination, and this in turn depends on whether a three-judge court was required. Appellants assert that it was not.

The authority, if it exists, for convening the three-judge district court in these actions must be conferred by Section 5 of the Voting Rights Act of 1965. (42 U.S.C. 1973c) The question of the convening of three-judge district courts in these actions outside the authority conferred, if such authority is conferred by Section 5 of the Voting Rights Act, is foreclosed by this Court's decision in *Swift & Co.* v. *Wickham,* 382 U.S. 111.

All counsel at bar appear to be in accord that the jurisdiction of the Three-Judge District Court and thereby the jurisdiction of this Court rest upon the construction to be given the last sentence of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) here quoted for ready reference by the Court:

> "Any action under this section shall be heard and determined by a court of three judges in accordance with

the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court."

Section 5 of the Act provides for only one kind of action—an action by a state or its political subdivisions with respect to which the prohibition set forth in Section 4(a) is in effect for a declaratory judgment that any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, which said state or political subdivision enacts or seeks to administer does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Section 5 further provides, and all counsel at bar agree, that the court before which said action shall be heard is the United States District Court for the District of Columbia, and that said Court shall be a three-judge court and any appeal shall lie to this Court.

The quoted language of Section 5 is plain and unambiguous. The phrase, "any action under this Section" can only mean any action the institution of which is authorized by and instituted pursuant to the provisions of said Section. Far from Appellants' contention that the phrase "any action" suggests more than a declaratory judgment action, the phrase in its ordinary and accepted meaning unequivocally limits the mandate for a three-judge court to actions "under" or pursuant to this Section.

Appellants, in their Brief, adopt the rationale of MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE, pages 8 and 9. There the Solicitor General urges that since the above quoted language of Section 5 is separated from the opening sentence of the Section, its location has some significance. Appellees submit that not only does the sentence appear in the most

logical place, but that its location lends support to the argument that it was the intention of Congress that the language apply to no actions other than actions for declaratory judgments. Moreover, it is clear that the phrase "any action" as contained in Section 5 applies only to the actions authorized by the Section since the sentence is not even a separate paragraph within the Section but is a part of the one paragraph which makes up the entire body of Section 5. In fact, the quoted sentence is in no manner separated from the body of the Section.

If Congress had intended, as Appellants urge, that jurisdiction be conferred on the three-judge court in the instant case, the statute, too easily, could have been drafted to so provide. Appellants argue that the last sentence of Section 5 must be read to permit a suit by aggrieved individuals alleging a violation of Section 5 to be filed in the district court of the district in which violation by a state or its subdivision is alleged to have occurred and that thereupon the district judge must convene a court of three judges to hear the suit. Nowhere in Section 5 can be found a mention of any court other than the United States District Court for the District of Columbia. Section 5 is a specific enlargement of the general jurisdiction of the Federal Courts. In enacting Section 5, Congress did so in light of the provision of Section 2281 (28 U.S.C.). To adopt the construction of the last sentence of Section 5 urged by Appellants is to engraft by strained inference upon the jurisdiction of United States States district courts other than that of the District of Columbia a special and an enlarged jurisdiction without express provision therefor in the statute.

The Section, as written, contains no enforcement provision. As a matter of fact, the only provision for enforcement of Section 5 that appears in the Act is Section

12(d) and that provision authorizes only the United States Attorney General to institute "an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under this Act to vote and (2) to count such votes." Paragraph (f) of the same Section provides that the district courts of the United States shall have jurisdiction of such proceedings. It does not provide for a three-judge court as does Section 10(c) for action brought under Section 10. It must be concluded that the only enforcement of Section 5 contemplated by the Act is pursuant to Section 12(d) and further, in the absence of a specific recitation by Congress providing for a three-judge court, that all enforcement proceedings shall be vested in the United States district courts, one judge sitting.

Appellants allude to the language in Section 5 of the Act, "subsequent action to enjoin enforcement of such qualification." This language is taken out of context and thereby loses its meaning completely. Said language was inserted in Section 5 of the Act to make plain that the Attorney General could bring a subsequent action to enjoin the enforcement of such qualification, prerequisite, standard, practice or procedure, if said enforcement was in violation of the Constitution of the United States. Appellants assert that "such an action would be under the Fifteenth Amendment, and would, therefore require a three-judge court under 28 U.S.C. Section 2281 in any event," therefore making the last sentence of the paragraph superfluous. This contention is without merit since the said subsequent action by the Attorney General contemplated by the above quoted language would be based not upon the ground that the qualification, pre-

requisite, standard, practice or procedure is unconstitutional, but that they are enforced in an unconstitutional manner. It is elemental that 28 U.S.C. 2281 does not control an action wherein the ground for said action is unconstitutional enforcement rather than unconstitutionality of the law itself. *Phillips* v. *United States,* 312 U.S. 246.

The Court's attention is invited to Section 14(b) of the Act. We find therein the language that:

> "[N]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any *declaratory judgment* pursuant to . . . Section 5 . . .". (Emphasis added)

Since the actions now on review before this Court are actions requesting declaratory judgments if such are "under" or "pursuant to" Section 5 of the Act, then jurisdiction to hear said actions would rest exclusively in the District Court for the District of Columbia. Said Section 14(b), if it means what it says, would appear to be the death knell to Appellants' argument that the present actions were brought "under" or "pursuant to" Section 5 of the Act.

Appellants assert in their Brief that:

> "[T]he purpose of the Voting Rights Act of 1965 and of three-judge courts in general support Appellants' contention that all actions related to Section 5 must be heard by a three-judge court."

This statement vividly points up Appellants' apparent misconception of the thrust of the said Act and the legal and constitutional theories upon which the Act was predicated. The proviso in Section 5 of the Act which requires a state or political subdivision to first obtain the approval of the Attorney General or in the absence of

such approval, the approval of the United States District Court for the District of Columbia before enacting or administering voting laws different from those in effect prior to November 1, 1964, is based upon the "freezing" principle. A suit by the Attorney General, as contemplated by Section 5 of the Act, to enjoin the operation and enforcement of new voting laws until such laws are first submitted to the Attorney General or the United States District Court for the District of Columbia does not draw into question the constitutionality of such voting laws, and therefore does not come within the ambit of the concern expressed by Congress in the enactment of 28 U.S.C. 2281. The actions now before this Court are not actions seeking an injunction against the enforcement of Section 6271-08, Mississippi Code, Annotated, 1942, as amended, on the ground that said Section or said actions are unconstitutional. This Court is not here confronted with a combat or clash between the sovereign state and/or political subdivision thereof and individuals in the constitutional arena. It is worthy to note that in actions brought by the United States under 42 U.S.C. 1971 in which the Attorney General requests a finding of a pattern or practice of discrimination, the Attorney General or any Defendant in such actions may request that a court of three judges be convened to hear and determine the entire cases. This proviso was inserted in said Section 1971 because the United States District Courts hearing and determining such cases could suspend, if they deemed necessary, certain voting laws of a state or political subdivision or portions thereof. But before the Courts could suspend such laws they must first find that such laws were being unconstitutionally administered. In the actions now before the Court no such finding is necessary, therefore such actions do not even rise to the same dignity as those under 42 U.S.C. 1971. Even under

said Section 1971 the convening of a three-judge district court was not mandatory.

It was necessary to place in Section 5 of the Act the proviso in regard to the convening of a court of three judges because the court action contemplated by said Section is one whereby, as a practical matter, an adverse finding as to the Plaintiff by the United States District Court for the District of Columbia would be tantamount to the issuance of an injunction enjoining the enforcement and operation of certain state laws because they have the purpose and will have the effect of denying or abridging the right to vote on account of race or color. Though this would be the practical effect of such a holding by the said District Court it would not technically come within the provisions of 28 U.S.C. 2281 because no judicial injunction is sought or issued since the injunction against the enforcement of such laws is the legislative injunction contained in the Act. Therefore, Congress deemed it appropriate to assert in said Section 5 of the Act, the last sentence which is now before this Court for construction. The congressional concern for this technical point is evidenced by the colloquy between Senator Ervin and Attorney General Katzenbach found at Pages 48-49 of the Hearings Before the Committee on the Judiciary, United States Senate, Eighty-Ninth Congress, First Session, which though directed to Section 4(a) of the Act is equally applicable to Section 5. A portion of said colloquy is here quoted for the benefit of the Court:

> "SENATOR ERVIN. But that is what the district court is here for, to determine whether denial or abridgment has occurred. At least, theoretically, they are here to give a person a chance to prove that he has not done that.

ATTORNEY GENERAL KATZENBACH. Senator, my reason for interpreting it this way would be that you do not get that kind of a judgment under this procedure in a previous paragraph. The only thing you can get under it is a declaratory judgment that you have not. You do not get a judgment that you have. Therefore, I would not have thought that this would have applied. But if the point is not clear, we ought to make it clear, I agree with you.

They seek a declaratory judgment that they have not; there is evidence that they have. The court denies the declaratory judgment that they have not. There is no judgment made that they have.

SENATOR ERVIN. The issue which is supposed to be raised is whether you have abridged or denied anybody's right to vote on account of race or color? Is that not the issue that is put in the bill?"

Further, at Page 71 of said Hearings, we find the following colloquy between Senator Ervin and Attorney General Katzenbach:

"SENATOR ERVIN. Is it the purpose of this bill to deny the district judge the right to try one of these cases by him or based upon—

ATTORNEY GENERAL KATZENBACH. No. I think the three-judge court is surely appropriate. You are testing here a constitutional question—

SENATOR ERVIN. And I—

ATTORNEY GENERAL KATZENBACH (continuing). On denial or abridgment. It goes into the 15th amendment question and I think the use of the three-judge court is quite appropriate. I didn't mean to cast any aspersions by drafting it this way."

On several occasions courts in the Fifth Circuit have determined the question as to what actions taken by a state or political subdivision thereof come within the purview of

the Voting Rights Act of 1965 without convening a court of three judges. In *Davis* v. *Gallinghouse,* 246 F. Supp. 208, a one-judge district court determined that documentation of residence did not come within the Voting Rights Act ban on tests and devices. In *United States* v. *Ward,* C.A. La., 1965, 352 F.2d 359 and *United States* v. *Ramsey,* C.A. Miss., 1965, 353 F.2d 650, the Court of Appeals for the Fifth Circuit remanded cases to one-judge district courts to enjoin the enforcement and operation of certain state statutes on the ground that they came within the proscription of the Voting Rights Act of 1965.

None of the reasons which brought about the enactment by Congress of 28 U.S.C. 2281 underlay an action wherein the conflict is between a state statute and a federal statute rather than a state statute and the Constitution of the United States. In the actions now before this Court the conflict is between a state statute and actions thereunder and a federal statute and do not involve a conflict between a state statute and actions thereunder and the Constitution of the United States.

II.

Section 6271-08 of the Mississippi Code As Amended by the Mississippi Legislature Does Not Come Within the Purview of Section 5 of the Voting Rights Act of 1965

(42 U.S.C.A. Section 1973c.)

These actions were purportedly brought by two classes of individuals. One class represents individuals who seek or desire to seek the Office of Superintendent of Education and the other class represents the individual voters of the counties involved. As to the class representing the candidates, we submit to the Court that the Voting Rights Act of 1965 in no way applies to such candidates, and submit

that the colloquy between Representative Corman and the Honorable Burke Marshall found at page 74 of the Hearings Before Subcommittee Number 5 of the Committee on the Judiciary, House of Representatives, Eighty Ninth Congress, First Session on H.R. 6400, Serial No. 2, and here set out for the convenience of the Court, forecloses further argument in this regard.

> "MR. CORMAN: We have not talked at all about whether we have to be concerned with not only who can vote, but who can run for public office and that has been an issue in some areas in the South in 1964: Have you given any consideration to whether or not this bill ought to address itself to the qualifications for running for public office as well as the problem of registration?
>
> MR. MARSHALL: The problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill."

As to the remaining class purported to be represented in these actions, we submit to the Court that Section 6271-08, Mississippi Code, as amended, is not embraced within or covered by the proscriptive provisions of Section 5 of the Voting Rights Act of 1965. (42 U.S.C.A. 1973c) The Voting Rights Act of 1965 is entitled "An Act To Enforce The Fifteenth Amendment To The Constitution Of The United States And For Other Purposes". The Act does not grant the right to vote. It only prescribes procedural rules and regulations whereby that right, protected by the Fifteenth Amendment to the Constitution, may be insured and guaranteed.

It is a matter of common knowledge of which this Court can take judicial notice that the 1965 Voting Rights Act was prepared in the main by the Attorney General

of the United States at the request of the President. On March 15, 1965, the President addressed a joint Session of Congress. The President made it perfectly plain what this Bill sought to do. We find his explanation on Page 4924 of the House Congressional Record when he said:

> "This bill will strike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote.
>
> This bill will establish a simple, uniform standard which cannot be used however ingenious the effort to flout our Constitution.
>
> It will provide for citizens to be registered by officials of the U. S. Government if the State officials refuse to register them.
>
> It will eliminate tedious, unnecessary lawsuits which delay the right to vote.
>
> Finally, this legislation wil insure that properly registered individuals are not prohibited from voting." (Emphasis added)

These consolidated cases involve a question that turns upon construction of a Federal Statute. Most relevant to the construction of a federal statute is the very language in which Congress has expressed its policy and from which the court must extract the meaning most appropriate. *Local 1976, U. B. C. & J.* v. *N.L.R.B.*, 357 U.S. 93, 2 L.Ed.2d 1186, 78 S.Ct. 1011.

Section 5 uses the words, "Qualification," "Prerequisite," "Standard," "Practice," or "procedure" five different times. They do, in each instance where they are used, refer only to "voting", which is defined in the Act by Section 14c thereof.

The definition of "voting" or "vote" is broad enough to insure that the votes of all citizens should be cast, counted,

". . . and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election."

Thus, it is clearly shown that the words "qualification," "prerequisite", "standard," "practice," or "procedure" are to be applied exclusively to "vote" or "voting," as those words apply to the appropriate totals and offices and propositions upon which the vote is to be taken.

> "The maxim 'noscitur a sociis', that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings, in order to avoid the giving of unintended breadth to Acts of Congress." *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 6 L.Ed.2d 859, 81 S.Ct. 1579.

We submit to the Court that the above quoted words, "from the company they keep" are limited as they apply to "vote" or "voting" and do not apply to the candidates who are voted upon.

The Amendment to Section 6271-08 of the Mississippi Code has nothing whatsoever to do with qualifications, prerequisites, standards, practices or procedures dealing with vote or voting, but deals exclusively and solely with the method by which the Superintendent of Education of a county will be chosen. Determination of the method by which a non legislative official is to be elected or appointed is a matter within the inherent and exclusive jurisdiction of the states and was not in any way altered or amended by the Voting Rights Act of 1965.

In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 15 L.Ed.2d 769, 86 S.Ct. 803, this Court stated that:

> "[T]he act automatically suspends the operation of voting regulations enacted after November 1, 1964, and furnishes mechanisms for enforcing the suspension."

The Court's attention is directed to one of these mechanisms which is contained in Section 5 of the Act (42 U.S.C.A. 1973c). This Section contains the proviso that in the event a state or political subdivision shall enact or seek to administer any voting or standard, practice or procedure, with respect to voting different from that in force or effect on or before November 1, 1964, without having same first approved by the Attorney General of the United States either affirmatively or by his failure to object or by the United States District Court for the District of Columbia then "no person shall be denied the right to vote for failure to *comply* with such qualification, prerequisite, standard, practice, or procedure." (Emphasis added)

Black's Law Dictionary defines "comply" as, "to yield, accommodate, or to adapt one's self to; to act in accordance with". We suggest to the Court that the use of the word, "comply" in the Act by Congress clearly shows that the qualification, prerequisite, standard, practice, or procedure contemplated in the Act were of a nature by which a person had to perform an act in the process of registering and/or voting. Section 6271-08 of the Mississippi Code, as amended, in no way calls upon a person to perform any new or additional act in the voting procedure applicable prior to November 1, 1964. It merely provided that County Superintendents of Education in certain counties would be appointed by the Board of Education. This method of selecting a non legislative official is practically identical with the method of selecting a County School Board in Michigan, which was approved by this Court in May, 1967 in *Sailors* v. *Kent Board of Education,* 18 L.Ed.2d 650.

An application of the plain and unambiguous language of the Act of Congress to the Amendment now in question makes it clear that this Amendment is not covered by, or within the purview of, the restriction on new voting regulations imposed by Congress. The Statute, being clear

and unequivocal on its face, relieves the Court of the task of resorting to legislative history. *United States* v. *Oregon*, 366 U.S. 643, 6 L.Ed.2d 575, 81 S.Ct. 1278, and *United States* v. *McKesson & Robbins, Inc.*, 251 U.S. 305, 100 L.Ed. 1209, 76 S.Ct. 937.

While it is unnecessary to resort to legislative history, we find that such history supports the conclusion that the Act does not apply to Section 6271-08, as amended, of the Mississippi Code.

On page 172 of the Hearings Before the Senate Judiciary Committee, Attorney General Katzenbach stated that the reason for the provision in the Voting Rights Act of 1965, now under scrutiny by this Court, was that in absence of, "a provision of this kind, you leave it open to a state to devise, if it can, some new method of *preventing people from voting* on grounds of race, * * *." (Emphasis added) The Attorney General further stated in way of example that as the government "won lawsuits in three States, three States decided to change the *qualifications for voting,* and we had to litigate the *new qualifications for voting.*" (Emphasis added)

Later, in the Attorney General's testimony on Page 237 of the said Senate Judiciary Committee Hearings in referring to 42 U.S.C.A. 1973c, appears the following:

> SENATOR ERVIN: "Since the bill does not intend to affect anything except tests or devices as defined in the bill, and any test or device that is contrary to the bill would already be null and void if the bill is constitutional, why in the world do you have to have a court test before a State can change its law?"
>
> ATTORNEY GENERAL KATZENBACH: "Well, Senator, it may be redundant insofar as it uses the word 'Qualifications,' if you equate qualifications with tests or devices.

It occurred to us that there are other ways in which States can discriminate, and we have had experience with State legislative efforts in other areas, for example, limiting the registrars to very short periods of time, or the imposition of either very high poll taxes or property taxes which would have the effect of denying or abridging rights guaranteed under the 15th amendment, that kind of law should be covered too.

This was put in with an effort of not letting a State legislature continue past practices of discrimination, preventing that or subjecting that to judicial review, somewhat the same way that State reapportionment plans are subjected to judicial review in order to determine their constitutionality."

SENATOR ERVIN: "Well, you have a provision in this bill to the effect that an examiner can go and order people registered."

ATTORNEY GENERAL KATZENBACH: "Yes, sir."

SENATOR ERVIN: "And an examiner is told to disregard State devices * * *"

ATTORNEY GENERAL KATZENBACH: "Yes. I do not think this is necessary with respect to tests and devices, and I do not suppose that tests and devices could be questioned under it.

But the effort here was to get at things that were not included within the words 'tests and devices'. And the thought that other things that violated the 15th amendment by a State should also be subjected to judicial review."

SENATOR ERVIN: "It seems to me that is a drastic power which can hardly be reconciled with the federal system of government, if we still have a federal system of government."

ATTORNEY GENERAL KATZENBACH: "I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.

Now, there may be better ways of accomplishing this. I do not know if there are. *There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right*; and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things—perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens." (Emphasis added)

During the debates in the United States Senate on the Voting Rights Act of 1965, Senator Mansfield stated on the floor of the Senate the following:

"FOURTH. As I mentioned earlier a great deal of ingenuity has been shown on occasion in enacting novel approaches to continue systematic exclusions after a particular device has been outlawed by the courts. To insure the effectiveness of all action in adopting this act, we provide that no State or political subdivision which was precluded under this act from enforcing tests or devices may enforce new qualifications or procedures until a Court rules that such *new qualifications* will not frustrate the mandate of the Fifteenth Amendment. This, of course, is merely a commonsense method of insuring that literacy tests and similar devices are not replaced by other vehicles

of discrimination as soon as the ban on literacy tests take effect."—April 22, 1965, Congressional Record—Senate, Page 8297. (Emphasis added)

Appellants lay great stress on the use of the terms "standards, practices or procedures" as used in the Statute and cite an exchange between Attorney General Katzenbach and Senator Fong in the hearing before the Judiciary Committee in the Senate. We find this exchange on Page 191 of the hearing before the Judiciary Committee. Senator Fong and Attorney General Katzenbach are discussing Section 2 of the Bill, which is Section 1973 of Title 42, not Section 1973c of this Title. Senator Fong was concerned about the use of the word "procedure" in connection with the question of voting qualification or prerequisite. He used this example to show what he meant:

"SENATOR FONG: For example, if there should be a certain statute in a state that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word 'procedure'. Could you?

ATTORNEY GENERAL KATZENBACH: I would suppose you could if it had that purpose. I had thought of the word 'procedure' as including any kind of practice of that kind if its purpose or effect was to deny or abridge *the right to vote on account of race or color.* (Emphasis added)

SENATOR FONG: The way it is now written, do you think there may be a possibility that the court would hassle over the word 'procedure'? Or would, probably, it allow short registration days or restricted hours to escape this provision of the statute?

ATTORNEY GENERAL KATZENBACH: I do not believe so, Senator, although the Committee might consider that. The language was used in the 1964 Act

on a similar matter, did use the terms 'standards, practices, or procedures.' Perhaps that would be broader than simply the word 'procedure' and perhaps the committee might consider making that point clear.

SENATOR FONG: You would have no objection to expanding the word 'procedure'?

ATTORNEY GENERAL KATZENBACH: No, it was intended to be all-inclusive of any kind of practice.

SENATOR FONG: I know that in Section 3(a) you have very much in detail spelled out the words, 'test or device'. (Referring to 1973b)

ATTORNEY GENERAL KATZENBACH: Yes.

SENATOR FONG: But you have not spelled out the word 'procedure'. I think that the word 'procedure' should be spelled out a little more.

ATTORNEY GENERAL KATZENBACH: I think that is a good suggestion, Senator."

The Bill was amended so as to substitute the words "Standards, practices or procedures" in lieu of the simple word "procedure." This was done in 1973 as well as 1973c; but it is plain to see that it had to do with the rights to register to vote; and did not pertain to the method of electing candidates for office.

The sum total of the remarks directed to 42 U.S.C.A. 1973c in the Congressional Committee Hearing and the floor debates is that Congress was only concerned with qualifications, prerequisites, standards, practices, and procedures which conceivably could be enacted or enforced by a State or political subdivision thereof which would have the effect of achieving the same discriminatory results as the tests and/or devices suspended by Section 4 of the Act (42 U.S.C.A. Section 1973b(a)). These tests and devices as shown by the definition placed upon them by Congress

in 42 U.S.C.A. 1973b(c) dealt entirely with a person's right to vote and not with any matter controlled by Section 6271-08, Mississippi Code, as amended.

We suggest to the Court that it is of great moment that 42 U.S.C.A. Section 1973c is no longer applicable to a State or political subdivision once that State or political subdivision has come out from under 42 U.S.C.A. Section 1973b(a). This clearly shows the intent of Congress to include in the terms "qualifications," "prerequisites," "standards," "practices," or "procedures," only those acts of a State or a political subdivision thereof, which would discriminate as to the exercise of the right to vote because of his race or color.

Section 5 of the Act should be given a narrow interpretation in view of the fact that its provision is an extraordinary one. This Court, in *South Carolina* v. *Katzenbach*, supra, noted that:

> "[T]his may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

Appellants, in their brief, seek comfort from *Sellers* v. *Trussell*, 253 F. Supp. 915 (M.D. Ala. 1966). A reading of this case readily shows that the decision in *Sellers* did not turn on a holding that the action taken by the Alabama Legislature, during its regular session of 1965, in extending by two years the terms of the incumbent county commissioners of Bullock County, Alabama, was such a change in the voting procedure that it came within the purview of Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. Section 1973c). This was a three judge court of Alabama composed of Circuit Judge Rives and District Judges Grooms and Johnson.

Judge Rives based his decision for enjoining the operation of that portion of Alabama Act number 536, which extended the terms of the incumbent commissioners, upon the grounds that: (1) That portion of the act had an apparent discriminatory effect; and (2) That said act is in conflict with Section 5 of the Voting Rights Act of 1965 (U.S.C.A. Section 1973c).

Judge Johnson specially concurred with Judge Rives, but did not reach the question of the applicability of Section 5 of the 1965 Voting Rights Act (Section 1973c). His concurrence was based on a finding that Alabama Act number 536 was racially motivated and, therefore, its purpose and effect was discriminatory.

Judge Grooms concurred in the finding of Judge Rives that Alabama Act number 536 was not enacted because of racially discriminatory motives, but dissented as to the other findings by Judge Rives and Judge Johnson.

Therefore, *Sellers* merely stands for the proposition that the enforcement of that part of Alabama Act number 536 which extended the terms of the incumbent commissioners should be enjoined because the effect, thereof, was racially discriminatory.

It is worthy of note that Judge Rives, in finding that Alabama Act number 536 was in conflict with Section 5 of the Voting Rights Act of 1965 (42 U.S.C.A. Section 1973c), admitted at page 918 of 253 F. Supp., that:

> "[A] close question is presented as to whether Alabama must follow the procedures of that section [Section 5 of the Voting Rights Act of 1965] in order to extend the terms of office of incumbent Bullock County officials and to postpone elections for two years."

In Mississippi and other states covered by the provisions of the Voting Rights Act of 1965, school trustees are elected by the qualified electors from the school dis-

tricts and bond issues are voted on only by the persons living within a defined district, all of which have existed in the laws of Mississippi prior to November 1, 1964.

Obviously, it was not the intent of Congress, in the Voting Rights Act of 1965, to guarantee and enforce individual rights under the Fifteenth Amendment to the extent of defeating other rights which states have as announced by this constitution.

For this Court to affirm would in no wise preclude appellants from filing an action in the United States District Court for the Southern District of Mississippi and to assert, therein, invidious discrimination. *Dusch* v. *Davis*, 18 L.Ed.2d 656, 660.

CONCLUSION

In conclusion, it is earnestly urged that the decision of the Three Judge District Court is correct and the Judgment of the District Court should be affirmed.

Respectfully submitted,

JOE T. PATTERSON
Attorney General of the State of Mississippi
WILL S. WELLS
Assistant Attorney General of the State of Mississippi
J. T. DRAKE
Post Office Box 366
Port Gibson, Mississippi
CORBAN AND CORBAN
Attorneys at Law
Fayette, Mississippi
CALVIN L. KING
Post Office Drawer 392
Durant, Mississippi
Attorneys for Appellees
By /s/ WILL S. WELLS